No. 10519

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATHANIEL WINSTON HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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knew to be the property of the United States, and which had come into his possession in the regular course of his official duty as Chairman of said War Price and Rationing Board. The second count makes the same allegations, except that instead of charging embezzlement it alleges that appellant "did knowingly, wilfully, unlawfully, and feloniously steal and purloin" the said 250 "A" gasoline rationing coupons.

To both counts of the indictment appellant pleaded not guilty [Tr. pp. 4 and 5], and, after a trial in said United States District Court the jury returned a verdict of guilty upon the charge of embezzlement, the first count of the indictment. [Tr. p. 22.] The second count of the indictment was dismissed upon motion of the United States Attorney before the cause was submitted to the jury. [Tr. p. 21.]

Thereafter, the Court sentenced appellant to imprisonment for a term of 5 years upon the charge of which he had been convicted [Tr. pp. 24 and 25]; and the case is now before this Honorable Court upon an appeal from that judgment. [Tr. pp. 25 and 26.]

Jurisdictional Statement.

A. The District Court had jurisdiction under the provisions of Section 41(2), Title 28, United States Code.

B. Under Section 546 of Title 18, United States Code, the crime with which appellant was charged is cognizable in the District Court.

C. This Court has jurisdiction by virtue of the provisions of Sections 225(a) and (d), Title 28, United States Code.

Statement of the Case.

Appellant was appointed Chairman of War Price and Rationing Board No. 5-48 of the State of California, by the Office of Price Administration on August 28, 1942. The Board had its offices at 1979 S. Vermont Avenue, in the City of Los Angeles. [Tr. p. 36.]

James P. Murray, a government witness, is the person who, according to his testimony, purchased from appellant the 250 "A" gasoline coupons, which formed the basis of the count upon which appellant was convicted. Murray testified that at the time he first saw the appellant at the Rationing Board Office, he, Murray, was engaged in the business of selling whiskey. [Tr. p. 47; App. p. 1.] Thereupon, over objection of appellant, Murray was permitted to testify as to at least six occasions prior to the date of the charge set forth in the indictment, upon which, according to him, he had illegally obtained "B" and "C" gasoline coupons from appellant, and also as to various incriminating conversations had with appellant concerning these coupons and the payment of money to appellant therefor. No charge as to any of these transactions is contained in the indictment. The testimony as to these purported offenses is contained in the appendix hereto attached, on pages 1 to 7 thereof.

On the 26th of May, Murray was arrested for selling gasoline coupons. He was released on $250.00 bond and later pleaded guilty to the charge. Subsequently to his arrest Murray talked several times to the Government Officers Foster, Taylor and Smith concerning appellant. [Tr. p. 60.] On the morning of June 2nd, the day of appellant's arrest, Murray phoned appellant

from the office of the Office of Price Administration in the presence of Foster, Taylor and Smith, investigators for that office. [Tr. p. 60.] This phone call was made at the suggestion of one of those men. [Tr. p. 62.] Murray did not tell appellant that these men were there, nor that appellant was shortly to be visited by them. [Tr. p. 60.] He told appellant at that time that he would like to have a case of Ancient Age and also a case of Brown Foreman. Appellant said he did not have any Brown Foreman, and suggested another half case of Ancient Age for it, to which Murray agreed. [Tr. pp. 56 and 57.] (Murray had previously testified that on an earlier occasion appellant had suggested using the name of "Ancient Age Whiskey" for "A" tickets and the name "Brown Foreman" for "B" tickets. [Tr. p. 54.]) In that conversation arrangements were made for Murray to meet appellant in front of appellant's apartment building, the Kenwood Arms Apartments on Kingsley and West Adams streets in the city of Los Angeles. [Tr. p. 57.] Thereupon, Foster Taylor and Smith, the OPA investigators, and Murray, went out to the apartment house. [Tr. p. 57.] Prior to reaching their destination the investigators searched Murray and found that he did not have any coupons on him at that time. He had in his possession a $20.00 bill and a $10.00 bill, and the investigators took the numbers off of those bills for identification. Murray met appellant in front of the apartment house where Murray gave appellant $30.00, which he put in his pocket and appellant gave Murray a bunch of coupons which Murday put in his pocket. Murray thereupon signaled to the three OPA investigators who then came upon the scene and arrested both appellant and Murray. [Tr. p. 57.]

No objection was made by Murray when the OPA investigators search him at that time, because he knew exactly what was going to take place. When he left the OPA headquarters he presumed that there would be an arrest. Before giving appellant the $30.00 he discussed it with the OPA investigators in their office. [Tr. pp. 61 and 62.] During the testimony of the witness Murray, there was introduced in evidence as Government's Exhibit 9, the $20.00 bill and the $10.00 bill referred to by the witness in his testimony. [Tr. p. 58.] There was also introduced in evidence at that time, as Government's Exhibit 10, the package of gasoline coupons which Murray testified he had received from appellant at the time of the passing of the $30.00. [Tr. p. 58.]

Richard W. Smith, a Government witness, testified that he was an investigator for the OPA; that he saw Murray meet appellant on the occasion when the $30.00 changed hands; that he saw Mr. Foster, also an investigator for the OPA, put his hand in appellant's pocket and take out a $20.00 bill and a $10.00 bill, and also that he saw Foster remove a package of "A" gasoline coupons from Mr. Murray's pocket at that time. Smith did not see the money pass between appellant and Murray, and did not see the coupons passed between the men. [Tr. pp. 63 and 64.]

Jona H. Taylor, a Government witness, testified that he was a legal investigator for the OPA; that he saw Murray and appellant together on the day of appellant's arrest, and that he saw Mr. Foster, another investigator at the office of Price Administration, take the two bills from appellant's pocket at that time. Taylor testified that

he had not seen anything pass between the two men at that time. [Tr. pp. 63 and 64.]

John E. Foster, a Government witness, testified that he was an investigator for the OPA; that he arrested appellant on June 2, 1943, in front of the Kenwood Arms Apartments on West Adams boulevard, in the City of Los Angeles, where appellant was in company with the witness Murray; that he searched appellant and found a $20.00 bill and a $10.00 bill which he had punched earlier in the morning for the purpose of identification; that at the same time he took a bunch of coupons from Murray's pocket; that he did not have a search warrant at that time, nor did he have a warrant for appellant's arrest; that he was not an FBI agent, nor a U. S. Marshal, nor a Deputy Marshal, and that he was neither a City Police Officer nor a County Police Officer. [Tr. pp. 64 and 65.]

At the close of the Government's case appellant moved the Court for a directed verdict of not guilty on both counts of the indictment. These motions were denied, and an exception to the Court's ruling allowed. [Tr. p. 66.]

The appellant did not take the stand in his behalf, but called five witnesses, all of whom testified that they had known the defendant for many years; that his reputation for truth, honesty, and integrity was good. [Tr. p. 66.]

After the evidence was closed, appellant moved the Court for a directed verdict of acquittal. This motion was denied by the Court and an exception to the Court's ruling allowed. [Tr. p. 66.]

Questions Presented.

As to the property alleged to have been embezzled by appellant, *viz.*, the 250 "A" gasoline coupons referred to in the indictment, the only evidence adduced by the Government was the testimony of Murray to the effect that "A" gasoline coupons were delivered to him by appellant, and the coupons themselves which were admitted in evidence. [Tr. pp. 47 to 62, incl.] No attempt was made by the Government to prove that these particular coupons were the property of the United States; that the appellant knew them to be the property of the United States, and that they had come into appellant's possession in the regular course of his official duty as Chairman of the War Price and Rationing Board, or, in other words, that they had been entrusted to the appellant or had come into his possession lawfully. Thus the first questions presented are:

> Was the evidence adduced by the Government sufficient to prove beyond a reasonable doubt that the property alleged to have been embezzled by the appellant was the property of the United States?
>
> Was the evidence adduced by the Government sufficient to prove beyond a reasonable doubt that the property alleged to have been embezzled had come into the possession of appellant in the regular course of his official duty as Chairman of the War Price and Rationing Board; in other words, that it had been entrusted to the appellant, or had come lawfully into his possession?

We take the position, of course, that ownership in the United States of the property alleged to have been embezzled, appellant's knowledge that the property was the property of the United States, and possession of the property by appellant in the regular course of his official duty as Chairman of the War Price and Rationing Board, were necessary elements of the offense charged against him in the indictment, and in order to warrant a verdict of guilty herein, each of such elements should have been proved beyond a reasonable doubt; and we contend that the record is devoid of any evidence whatsoever tending to prove these elements, or any of them.

The evidence offered by the Government tending to show purported similar offenses committed by appellant and not charged against him in the indictment was received upon the theory that the Government was entitled to show similar embezzlements for the purpose of proving the intent of the appellant in connection with the offense for which he was on trial. This theory was advanced by the Government as a basis for the admission of such testimony and was concurred in by the trial court. Emphasizing the reason for its ruling in this connection, the Court instructed the jury that such evidence was to be considered on the question of appellant's intent in the commission of the offense charged against him in the indictment. The next question presented, then, is:

> Under the circumstances of this case, did the trial court err in admitting in evidence testimony as to the purported similar offenses alleged to have been

committed by the appellant, for the purpose of proving appellant's intent in connection with the offense with which he was charged in the indictment?

Since the evidence adduced on behalf of the Government showed that appellant had transferred gasoline coupons to the witness Murray and had received money therefor, and assuming that all of the other elements of the offense of embezzlement were proved, there could be no question then as to the intent with which the act was done; and it was, therefore, improper to permit the introduction of evidence of other purported offenses, since it is only where the intent is ambiguous or equivocal that proof of similar offenses is permitted for the purpose of proving the intent with which the act charged against the defendant is done.

Specification of Errors.

I.

The District Court erred in denying appellant's motions that the jury be directed to return a verdict of not guilty in favor of the defendant as to the count upon which appellant was convicted, since there was no evidence to sustain a conviction of appellant upon the chrage of embezzlement:

A. There was no sufficient proof that the coupons alleged to have been embezzled were the property of the United States.

B. There was no sufficient proof that appellant knew the coupons alleged to have been embezzled were the property of the United States.

C. There was no sufficient proof that the coupons alleged to have been embezzled had come into the possession of appellant in the regular course of his official duty as chairman of the War Price and Rationing Board.

II.

The District Court erred in overruling appellant's objections to the questions propounded to the witness Murray seeking to elicit from him conversations with appellant and the acts and conduct of appellant in connection with the purported transfers and sales of gasoline coupons, all of which conversations and acts and conduct took place prior to the date of the offense of which appellant was convicted and concerned purported offenses not charged against appellant in the indictment herein; said objections being upon the ground that the same were incompetent, irrelevant, and immaterial, had no bearing upon the issues of the case, and were too remote. This testimony is set forth in detail in the appendix attached hereto. [App. pp. 1 to 7.]

ARGUMENT.

I.

The Court Erred in Denying Appellant's Motions That the Jury be Directed to Return a Verdict of Not Guilty in Favor of Defendant as to the Count Upon Which Appellant Was Convicted, Since There Was No Evidence to Sustain a Conviction of Appellant Upon the Charge of Embezzlement.

A. There Was No Sufficient Proof That the Coupons Alleged to Have Been Embezzled Were the Property of the United States.

The evidence concerning the 250 "A" gasoline coupons alleged to have been embezzled by appellant is very brief. It consists of the testimony of the witness Murray to the effect that he received those coupons from appellant at the meeting between him and appellant in front of appellant's apartment house [Tr. p. 57]; the testimony of the witnesses Foster, Taylor and Smith that gasoline coupons were taken from appellant's pocket by Foster after appellant and Murray had met on that occasion [Tr. pp. 62 to 65, incl.]; and finally, the gasoline coupons themselves, which were introduced in evidence as Government's Exhibit 10. [Tr. p. 58.]

Nowhere in the record is there any indication of an attempt upon the part of the Government to prove that the coupons were the property of the United States.

The indictment herein charges that on or about the 2nd day of June, 1943, and while the defendant was a

duly appointed, qualified, and acting Chairman of War Price and Rationing Board No. 5-48, he did

> "knowingly, wilfully, unlawfully and feloniously embezzle certain property of the United States, to-wit: 250 'A' gasoline rationing coupons * * * which said property had * * * come into the possession of said defendant in the regular course of his official duty as said Chairman of said War Price and Rationing Board, as aforesaid, said defendant then and there well knowing said property to be the property of the United States * * *." [Tr. pp. 2 and 3.]

The Court instructed the jury that the indictment charged appellant with a violation of Section 100 of Title 18 of the United States Code Annotated, which section provides for the punishment of anyone who "shall embezzle * * * property of the United States * * *." [Tr. p. 69.]

The Court further instructed the jury that if they entertained a reasonable doubt as to whether or not any one element of the offense as set forth in the charge against appellant was not substantiated by the proof offered by the Government, then it was their duty to acquit the defendant. [Tr. p. 71.]

The Court in its instructions also defined embezzlement as

> "the fraudulent appropriation of property by a person to whom it has been entrusted, or into whose hands it has lawfully come." [Tr. p. 69.]

Moore v. United States, 160 U. S. 268, 40 L. Ed. 422.

The essential elements of the crime of embezzlement are succinctly stated in the case of *People v. Schroeder*, 43 Cal. App. 623, as follows:

1. That defendant was acting in a fiduciary capacity;

2. That he obtained and held the property in such trust capacity;

3. That the property belonged to his principal; and

4. That he converted it to his own use, in violation of his trust.

From the very definition of the crime of embezzlement, it is obvious that the property embezzled must have belonged to some one other than the person charged with the embezzlement, since one can not "fraudulently appropriate" his own property; nor can it be said that property already belonging to a person could be "entrusted" to him by another. In order, therefore, to convict a person of the crime of embezzlement, it is necessary to prove beyond a reasonable doubt that the property belonged to someone other than the accused. That is one of the essential elements of the offense; and in this case it was incumbent, therefore, upon the Government to prove beyond a reasonable doubt that the coupons charged to have been embezzled were the property of the United States.

As we have pointed out, none of the evidence concerning these coupons touched at all upon the subject of their ownership, and there is nothing whatsoever in the record to prove that essential element of the offense. Without this proof appellant could not be guilty of the offense charged.

B. There Was No Sufficient Proof That Appellant Knew the Coupons Alleged to Have Been Embezzled Were the Property of the United States.

The indictment charged, as will be noted, not only that the coupons alleged to have been embezzled were the property of the United States, but also that the appellant knew them to be the property of the United States at the time of the alleged embezzlement. [Tr. pp. 2 and 3.]

Such knowledge upon the part of appellant, therefore, was one of the essential elements of the offense of embezzlement necessary to be proved beyond a reasonable doubt by the Government; and in this connection the jury was instructed that if they entertained a reasonable doubt as to whether any one element of the offense charged against appellant was not substantiated by the Government, then it was their duty to acquit appellant.

We call the Court's attention to our summary of the evidence concerning these gasoline coupons, as set forth hereinabove in subdivision A hereof.

If there was no proof that the coupons were the property of the United States, it follows that there can be, and there was, no proof in the record that appellant knew them to be the property of the United States.

Thus it is manifest the government failed to prove another of the essential elements of the offense charged against appellant.

C. There Was No Sufficient Proof That the Coupons Alleged to Have Been Embezzled Had Come Into the Possession of Appellant in the Regular Course of His Official Duty as Chairman of the War Price and Rationing Board.

As pointed out hereinabove, the indictment charged that the coupons alleged to have been embezzled

> "had * * * come into the possession of said defendant in the regular course of his official duty as said Chairman of said War Price Rationing Board, as aforesaid * * *";

and the indictment was read to the jury in the course of the Court's instructions. [Tr. pp. 2 and 3.]

Possession of the coupons in the manner set forth in the indictment, then, was another essential element of the offense charged against appellant and which the Court instructed the jury would have to be proved beyond a reasonable doubt, or if not, a verdict of acquittal should be returned in favor of appellant. [Tr. p. 71.]

In the crime of embezzlement it is necessary that the accused shall have come into possession of the property embezzled in a fiduciary capacity; and in this case it was necessary to prove the particular fiduciary capacity, namely, that the coupons had come into appellant's possession in the regular course of appellant's duty as chairman of the War Price and Rationing Board.

A glance at the summary of the evidence received in connection with these coupons, as set forth hereinabove

in subdivision A, will immediately disclose that no proof of any kind whatsoever was made as to appellant's having come into the possession of the coupons in any kind of fiduciary capacity, let alone proof that he had come into their possession in the regular course of his official duty as Chairman of the War Price and Ration Board.

In the case of *Moore v. United States,* 160 U. S. 268, 40 L. Ed. 422, *supra,* the indictment charged that the defendant "being then and there an assistant, clerk, or employee in, or connected with, the business or operations of the United States post office in the city of Mobile in the State of Alabama, did embezzle, etc." In discussing the sufficiency of that indictment the Court said:

> "For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employee of the postoffice be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since the defendant might be held for the property received in a wholly different capacity —such, for instance, as a simple bailee of the government. In the absence of a statutory regulation the authorities upon this subject are practically uniform. Whart. Crim. L. 1942; Rex v. Snowley, 4 Car. & P. 390; Com. v. Simpson, 9 Met. 138; People v. Sherman, 10 Wend. 298, 25 Am. Dec. 563; Rex v. Prince, 2 Car. & P. 517; Rex v. Thorley, 1 Mood. C. C. 343; Rex v. Bakewell, Russ. & R. 35."

And, of course, if an allegation that the property came into his possession by virtue of his employment be required in the indictment, it follows naturally that proof of that element would be necessary to make out the offense.

In the case of *United States v. Allen*, 150 Fed. 152, the defendant, a post office clerk, was charged with embezzlement of money order funds. The indictment failed to allege that the money came into his hands by virtue of his employment. In holding the indictment insufficient because of such failure, the Circuit Court discussed the reasons for requiring such allegations and proof thereof, and also the effect of a failure to plead and prove those facts. The Court said:

> "Although this count charges that the defendant was an employe of the post office and that he converted the money order funds of the United States, the property of the United States, it fails to allege that the money came to his hands by virtue of his employment. The mere fact that a person is an employe in one department of a common establishment does not make it embezzlement if he feloniously steals property under the control of another employe of the same establishment, unless the property itself was lawfully placed in his hands and thereafter by him unlawfully converted. An employe of a post office engaged in the distribution of the mails solely, who feloniously steals money out of a drawer in which are kept the money order funds in charge of another clerk, is guilty of larceny, but not of embezzlement; for, although he was an employe of the post office, the money stolen did not come to his possession by virtue of his employment nor with the consent of the

> owner, without which there can be no embezzlement. Aside from that fact an acquittal of this charge could not be pleaded in bar to another indictment for the same offense, which charged that this money came into his possession by virtue of his employment and was by him unlawfully converted to his own use."

In support of the portion of the indictment under consideration here, it was incumbent upon the government to prove beyond a reasonable doubt that the coupons alleged to have been embezzled came into appellant's possession in his fiduciary capacity, and in the regular course of his official duty as chairman of the War Price and Rationing Board.

It is true that there was evidence adduced tending to show that appellant was the chairman of the War Price and Rationing Board at the time of the commission of the offense charged [Tr. p. 42], but there is not one word of evidence that these particular coupons came into his possession as such chairman, or in any other fiduciary capacity, or that he had acquired possession thereof in any lawful manner. For aught that appears in the record, these coupons may have been stolen by the appellant; he may have found them on the street, or in any other place; he may even have obtained them from the witness Murray prior to the time they were turned over to the latter by appellant; he might have taken them from the office of another Rationing Board; or he may have acquired them in any one of a variety of ways other than as Chairman of the Rationing Board. Under any of such circumstances, appellant could not have been guilty of the crime of embezzlement, since he had not come into possession of the coupons in the manner alleged in the indictment. The

proof adduced here (assuming that it was proved that the coupons were genuine coupons properly issued by the United States) might support a charge of transferring, or having the possession of gasoline coupons not legally issued to appellant, in which event he could be charged with the commission of a different offense under the law; but such proof is wholly insufficient to prove that essential element of the crime charged, namely, that appellant had come into possession of the coupons in the regular course of his official duty as chairman of the War Price and Rationing Board.

II.

The District Court Erred in Admitting in Evidence, Over the Objection of Appellant Evidence Offered for the Purpose of Proving Other Separate and Distinct Offenses Not Charged in the Indictment.

Over appellant's objection, the witness Murray was permitted to testify as to conversations with appellant and as to the acts and conduct of appellant in connection with the purported transfer and sale of gasoline coupons by appellant to Murray. All of these conversations and all of such acts and conduct of appellant as testified to by Murray took place prior to the date of the offense of which appellant was charged, and concerned purported offenses not charged against appellant in the indictment herein. Appellant's objections were made upon the ground that the evidence was incompetent, irrelevant and immaterial, had no bearing upon the issues of the case, and was too remote. These objections were overruled and exceptions duly taken. The theory upon which such evidence was admitted was that evidence of similar offenses is admissible to prove the intent with which the act charged

was committed; and the Court instructed the jury that such evidence was to be considered only for the purpose of proving appellant's intent concerning the coupons charged to have been embezzled by him.

A. The Evidence Objected to Was Not Admissible for the Purpose of Proving Intent.

Because the testimony of the witness Murray as to the other purported offenses alleged to have been committed by appellant consumed several pages, we have placed it in an appendix to this brief [App. pp. 1 to 7]; but a short summary of that testimony will be of value here in considering this particular point. Murray, who was a whiskey salesman, talked with appellant at the Office of the Rationing Board. [Tr. p. 47; App. p. 1.] He asked appellant for extra coupons, and appellant gave him some out of a sack. [Tr. p. 47; App. p. 1.] Later, when Murray ran out of coupons, he asked appellant for more and appellant told him to get some out of a newspaper which was in appellant's car. This, Murray did. [Tr. pp. 48 and 49; App. p. 2.] On the next occasion of Murray's seeing appellant, the latter told him that he, Murray, could not get any more coupons without cost, and said that if Murray could sell some coupons, he thought he could get him some. Appellant told Murray that the latter would have to pay him $20.00 per thousand for the coupons, and that anything over that amount Murray could keep. [Tr. p. 50; App. p. 3.] A few days later Murray got some "C" coupons from appellant. [Tr. p. 51; App. p. 3.] About the first of March, Murray asked appellant for more gas coupons, and appellant gave him a thousand gallons of coupons. [Tr. pp. 51 and 52;

App. p. 4.] Later, Murray called appellant on the telephone and said he could sell one thousand gallons of "C" coupons, and pursuant to that conversation Murray and appellant met and appellant told Murray to pick up a newspaper which he, appellant, had placed by a telephone post. Murray picked up 250 "C" coupons in the newspaper. [Tr. p. 53; App. p. 5.] Murray sold these coupons and gave $20.00 to appellant. [Tr. p. 53; App. p. 5.] At that time appellant told Murray that when Murray called, if he wanted "A" coupons to ask for Ancient Age Whiskey; "B" coupons would be Brown Foreman, and "C" coupons would be Calvert's, and if he wanted one thousand coupons, he was to ask for one case of whiskey. [Tr. p. 54; App. p. 6.] Later, Murray phoned appellant and told him he needed a case of Calvert's, and appellant said O.K. Thereupon, Murray met appellant and received coupons from him, but no money passed. [Tr. p. 55; App. p. 7.] A few days before Murray was arrested he met appellant and appellant gave him a white box containing three thousand gallons of "T" coupons and two thousand gallons of "C" coupons. [Tr. pp. 55 and 56; App. p. 7.] This box and its contents was introduced in evidence as Government's Exhibit 11. [Tr. p. 59; App. p. 7.]

Thus we find that the jury had before it evidence of at least six separate and distinct offenses not charged in the indictment, and concerning which appellant had no notice and no opportunity to prepare a defense. The rule, of course, is too well-settled to require more than stating that evidence of other offenses is not permitted to prove the charge on which the defendant stands accused, except for certain limited purposes. One of these pur-

poses is the intent with which the defendant did the act which constitutes the basis for the charge. In other words, where intent is an issue, proof of similar offenses may be admitted for the purpose of proving that intent. Where, however, intent is not an issue, or where the intent is not ambiguous or doubtful, then the attention of the jury should not be diverted from the main issue, and collateral matters prejudicial to the defendant and evidence of such other similar offenses should not, under such circumstances, be admitted. Here the testimony offered by the government showed that appellant turned over to Murray the 250 "A" gasoline coupons and received $30.00 therefor. If appellant performed that act in the manner tesified to, then it is obvious that there can be no question as to the intent with which it was done. In other words, there is nothing here which would render the intent of appellant in doing the act doubtful, or equivocal. The situation presented is the same as if intent were not an issue in the case, and, under these circumstances, of course, proof of similar offenses is inadmissible.

> "For the purpose of proving intent, evidence of other similar offenses is admissible only when the intent accompanying the act is equivocal."
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> 8 *Cal. Jur.* "Criminal Law," p. 64.

In the case of *People v. Byrnes*, 27 Cal. App. 79, the defendant was convicted of the crime of grand larceny. At the trial the Court permitted the introduction of evidence tending to show the commission of other offenses similar to that charged against the defendant. This evidence was admitted upon the theory that it tended to prove the felonious intent with which the defendant committed

the act charged in the indictment. After pointing out that the evidence objected to was insufficient to prove the necessary elements of the purported similar offenses, the Appellate Court held also that it is only where the intent accompanying the act charged is equivocal that evidence of similar offenses for the purpose of showing intent is admissible; and in this connection the Court said:

> *"Moreover, as stated, the reception of this character of evidence for the purpose of showing intent, is an exception to the rule and should only be received in cases where the intent accompanying the act is equivocal,* or where it otherwise becomes an issue in the trial, as where it is claimed the act was the result of mistake, accident, or inadvertence, where from the nature of the acts constituting the crime with which the accused is charged, proof of its commission carries with it the evidence and conclusive implication of guilty knowledge, there is no occasion for admitting such evidence, and the rule, not the exception, should apply. (People v. Glass, 158 Cal. 654 (112 Pac. 281).) Surely, if a man is captured while making his exit in the night-time through a broken window of a store-room, having in his possession goods of the owner stolen therefrom, and his defense is an *alibi,* no evidence of other like acts committed by him should be required to show the criminal intent with which he committed the act. *So in the case at bar, proof of the acts by means whereof Friesz claimed to have lost his property, was of a character which could leave no doubt in the minds of the jurors as to the criminal intent accompanying the act."* (Italics ours.)

In the case of *Fish v. United States,* 215 Fed. 544, the defendant was convicted of wilfully burning a yacht for

the purpose of collecting insurance thereon. At the trial the Government was permitted to introduce in evidence, over the objection of the defendant, testimony to the effect that during the preceding 14 months an automobile and another yacht owned by defendant had been burned; that both were over-insured; that defendant was heavily in debt and without money, and was in each case the first to discover the fire, but had made no attempt to save the property. In the course of its opinion reversing the case because of the erroneous admission of such evidence of similar offenses, the Circuit Court of Appeals for the First Circuit used the following language:

> "A consideration of the evidence that relates strictly to the fire of October 25, 1910, to the second Senta (the charge in the indictment), leads one to the conclusion that the doubtful questions as to which the jury was called upon to determine was not whether the fire was accidentally set, but whether the defendant set it; that, if it were established that the defendant set the fire, *there could be no doubt that the act of setting it was not accidental, but intentional,* and was done for the purpose of prejudicing the underwriters and replenishing the defendant's depleted and empty pockets."
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> * * * * * * * *
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> *"Such being the state of the proof negativing any idea that the fire might be accidental, we are of the opinion that this was not a case where evidence of previous fires should have been received for this purpose.* Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and

should be received, if at all, only in a plain case. People v. Sharp, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. Lapage, 57 N. H. 245, 295, 24 Am. Rep. 69."

* * * * * * * *

"While there are exceptions to the general rule—that on the trial of a person for one crime evidence that he has been guilty of other crimes is irrelevant—it is not to be understood that any of the exceptions, when rightly applied, go to the extent of sanctioning the idea that a defendant's propensity to commit crime, or to commit crimes of the same sort as the one charged, can be put in evidence to prove him guilty of the particular offense; and that to come within the exceptions there must be some other real connection between the extraneous crime and the crime charged. As said by Judge Dixon in State v. Raymond, 53 N. J. Law, 265, 21 Atl. 330:

" 'However reasonable would be the deduction that, when a pocket is picked in a group of persons, of whom only one is addicted to picking pockets, he is the offender, his singularity in this respect could not, under our legal theory, figure as proof of his guilt. There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection beyond the allegation that they have both sprung from the same vicious disposition.'

"This is the rule that is generally followed in this country, and that prevails in Massachusetts and in the Federal courts, as will be seen from an examination of the following cases (citing cases)."

On the general subject of the effect of the use of similar offenses for the purpose of proving the main charge

against a defendant, we refer to the case of *Boyd v. United States,* 142 U. S. 450, 35 L. Ed. 1077. In that case the defendants were convicted of the crime of murder. At the trial the Government was permitted to introduce in evidence, over the objection of the defendants, testimony tending to show that the defendants had, on several occasions prior to the commission of the offense charged, committed the crime of robbery. The Supreme Court of the United States held that the introduction of this evidence was erroneous and prejudicial to the rights of the defendants, and in reversing the judgments of conviction, used the following language:

> "If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the court. But we are constrained to hold that the evidence as to the Brinson, Mode, and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government

to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. *Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.*

"Upon a careful scrutiny of the record, we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. *However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.*" (Italics ours.)

The prejudicial effect of the erroneous admission of similar offenses is discussed also in the case of *Hatchet v. United States,* 293 Fed. 1010. There the defendant was convicted of the crime of larceny. The evidence for the Government tended to show that while Mike Bavoul was standing on a streetcar platform in the city of Washington, the defendant and another took from his pocket a pocketbook containing $95.00; that Hatchet ran, but was pursued and captured. At the trial, over the objection and exception of the defendant, two Government witnesses were permitted to testify that the defendant gave his right name as John Hatchet, and denied that he had

ever been arrested before; that after his fingerprints had been taken the defendant admitted he had been arrested in Philadelphia under a charge of larceny, under the name of John Brown; that a picture of John Brown was taken out of the rogues' gallery, shown to the defendant and he admitted that it was his picture.

In reversing the judgment of the trial court, the upper Court used the following language:

> "The foregoing decisions are determinative of the question here. *There was no issue as to appellant's identity; he did not testify, and yet the government was permitted to place before the jury evidence tending to show that he was a man with a criminal record. While there may have been, and probably was, competent evidence warranting conviction, it would be going far to say that appellant was not prejudiced by the admission of this incompetent evidence.* He was entitled to a fair and impartial trial, and that he could not have, after it was made to appear, through the introduction of incompetent evidence, that his picture adorned the rogues' gallery, in connection with his arrest in Philadelphia for a similar offense; in other words that, with criminal propensities, he had operated elsewhere and under another name." (Italics ours.)

B. The Requisite Proof of the Commission of the Purported Similar Offenses Was Not Met by the Government.

The Court instructed the jury that before they could infer guilty intent from the evidence of similar offenses, such offenses and all elements thereof must be established by evidence which is plain, clear, and conclusive. [Tr. p. 70.]

This is simply another method of stating that those offenses, and all the elements thereof, must be proved to the jury's satisfaction beyond a reasonable doubt.

We submit, however, that none of the evidence introduced for the purpose of showing similar offenses alleged to have been committed by appellant measured up to that standard. A glance at the summary of the evidence set forth hereinabove in Subdivision A hereof, or as set forth more in detail in the appendix hereto, will at once make that manifest. No effort was made to prove that the gasoline coupons turned over to Murray by appellant on those occasions were the property of the United States, nor that appellant knew them to be the property of the United States, nor that appellant had received them in a fiduciary capacity as chairman of the War Price and Rationing Board, or that he had received them in any fiduciary capacity. In other words, this evidence was subject to the same objection as the evidence concerning the charge of embezzlement of which appellant was convicted; and it was wholly insufficient for the purpose for which it was offered.

Where, under the pretext of showing intent, evidence of other similar offenses is adduced against the accused, the prosecution "assumes the same burden" as to such other offenses that it is charged with by law in the main case.

People v. Whitman, 114 Cal. 338 at 343;
People v. Bird, 124 Cal. 32 at 34.

The commission of the other offenses must be proved beyond a reasonable doubt.

Haley v. State, 209 S. W. 675 (Texas).

In the case of *People v. Byrnes,* 27 Cal. App. 79, *supra,* the Court held that the evidence introduced for the purpose of proving similar offenses was insufficient to prove the necessary elements of those offenses; and in this connection said:

> "That the evidence tended strongly to show that at the times in question defendant was present, engaged in the operation of an unlawful scheme whereby these witnesses were swindled, may be conceded, but the transaction was wholly lacking in the material element existing in the main case, viz., the fraud and deception practiced upon Friesz. 'When the body of the offense has been established, and that defendant passed the check, and it is sought to show guilty knowledge by the fact *that defendant also passed other forged paper, the prosecution assumes the same burden as to all the other checks introduced. It must show that such checks were forged.'* People v. Whiteman, 114 Cal. 338, 46 Pac. 99; People v. King, 23 Cal. App. 259, (137 Pac. 1076); People v. Bird, 124 Cal. 32, 56 Pac. 639. *The testimony* of Torline and Koehler, wherein they identified defendants as operating a betting exchange or pool-room at Redondo, *was insufficient to establish a like offense in that it was wholly lacking in the essential element of deception and fraud required to constitute the crime with which defendant was charged.'"* (Italics ours.)

In the case of *Paris v. United States,* 260 Fed. 529, the defendant was charged with unlawfully carrying on the business of dealing with narcotics. At the trial the Government was permitted to introduce in evidence, over the objection of the defendant, testimony to the effect that at a time prior to the time of the act charged in the

indictment, the defendant had been arrested in another city and 20 bottles of morphine had been found in his handbag. There was no evidence introduced that the defendant ever sold any morphine at the other city, and there was no evidence that that transaction was connected in any way with the transaction which formed the basis of the indictment.

In reversing the case and holding that the evidence objected to was incompetent, irrelevant and prejudicial, because it failed to prove any sale of, or dealing in, any narcotics at the other city by the defendant, the Court used the following language:

> "The admission of this evidence relative to the Tulsa affair is specified as error, and it is difficult to discover any rule or principle upon which its admission can be sustained.
>
> "The general rule is that evidence of the commission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. Boyd v. U. S., 142 U. S. 454, 456, 457, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 81, 82 Sup. Ct. 22, 37 L. Ed. 1003; 16 C. J. 586, 1132. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. *In cases falling under such an exception to the rule, however, it is essential to the admissibility of evi-*

dence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. Baxter v. State, 91 Ohio St. 167, 110 N. E. 456; State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; 16 C. J. 592; People v. Sharp, 107 N. Y. 427, 469; 14 N. E. 319, 1 Am. St. Rep. 851; State v. La Page, 57 N. H. 245, 259, 24 Am. St. Rep. 69; Fish v. United States, 215 Fed. 545, 549, 132 C. C. A. 56, L. R. A. 1915A, 809. Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial." (Italics ours.)

In the case of *Gart v. United States,* 294 Fed. 66, the defendant was convicted of a violation of the Harrison Narcotic Act. The evidence in support of the charge of unlawful sale of narcotics tended to show that a delivery of the drug was made upon a street in the city of Denver. Evidence was introduced by the Government which tended to show that at a different time and place upon a street in Denver, the defendant delivered a package to another party. The objection of the defendant to that evidence was overruled. The Government failed to prove by any testimony what the package so delivered contained. In the course of its opinion reversing the case, the Circuit Court of Appeals for the Eighth Circuit used the following language:

"It must be apparent that such a line of testimony if not properly admissible would be highly

prejudicial. Standing as evidence before the jury, it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets by delivering packages containing the drug to persons indiscriminately, and yet there was no proof that the package so testified as having been delivered by the defendant at a time and place not charged in the indictment contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance, which not having been taken from the jury by the trial court left it with them for consideration.

"The scope and purpose of testimony concerning similar offenses is limited, as has been laid down in the Supreme Court of the United States in the cases of Boyd v. United States, 142 U. S. 454, 12 Sup. Ct. 292, 35 L. Ed. 1077, and Hall v. United States, 150 U. S. 76, 14 Sup. Ct. 22, 27 L. Ed. 1003. *Only in exceptional cases is the proof of such transactions admissible. Where a case falls within the exception, the proof must be clear and convincing* It will be unnecessary to discuss the point in this case as to whether or not this line of testimony fell within the exception to the general rule governing the proof of similar offenses, for the reason that in the case at bar we have no proof of an offense, but merely proof of a suspicious circumstance. (Italics ours.)

The Court then stated that the rule which should apply to this case is the one stated in the case of *Paris v. United States,* 260 Fed. 529 at page 531, *supra,* to which reference is hereby made.

In the case of *MacLafferty v. United States,* 77 Fed. (2d) 715, a case decided by this Court, the defendant

was convicted of the sale of laudanum, in violation of the Harrison-Anti-Narcotic Act. At the trial of the case the Government was permitted to introduce in evidence, over objection of the defendant, testimony to the effect that the defendant had issued eight other prescriptions for laudanum. The defendant testified that the persons to whom these prescriptions had been issued was being treated by the defendant for a case of ear trouble, and the prescriptions had been issued in the treatment of the disease. The defendant requested an instruction to the effect that the Government must establish beyond a reasonable doubt that the acts of the defendant in issuing the prescriptions other than those charged in the indictment were criminal. This instruction was refused by the Court, but the Court did instruct the jury that the testimony as to the other prescriptions was admissible as bearing upon the intent with which the prescription mentioned in the indictment had been issued.

In reversing the case and holding that the trial court should have given the requested instruction, this Court held that it was necessary for the Government to show that the other prescriptions were connected with actual violations of the law, and in this connection the Court said:

> "In view of the fact that all the physicians who testified stated that the prescriptions were proper in treatment for ear trouble; that there was no evidence that Jack Wilson was not a bona fide patient suffering with ear trouble or any showing that he had not been treated for ear trouble by appellant as testified to by him, this case was not in line with those authorities which hold that it is proper to allow evidence of other crimes to establish intent.

"We hold that before the evidence in relation to these prescriptions other than the ones described in the indictment could be admitted in evidence it was necessary for the government to show that such other prescriptions or sales were connected with actual violations of the law. The rule to be applied in such cases is set forth in Coulston v. United States (C. C. A. 10), 51 F. (2d) 178, at page 180, cited by appellee, where the court speaks as follows:

" 'In the civil law, and very early in the common law, evidence of other crimes was admitted on the theory that a person who has committed one crime is apt to commit another. The inference is so slight, the unfairness to the defendant so manifest, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible. Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 14 S. Ct. 22, 27 L. Ed. 1003; Niederluecke v. United States (C. C. A. 8), 21 F. (2d) 511; Cuccia v. United States (C. C. A. 5), 17 F. (2d) 86; Smith v. United States (C. C. A. 9), 10 F. (2d) 787; Wigmore on Evidence (2d Ed.) 194. Corpus Juris cites cases from forty-four American jurisdictions in support of this rule. 16 C. J. 586. There are many exceptions to the rule, the most common of which is that, if the prosecution must show a specific intent, evidence of other similar offenses may be used to establish that fact.'

"The particular exceptions here under discussion are noted in Paris v. United States (C. C. A. 8), 260 F. 529, at page 531, where the court, after citing some of the authorities set forth above, declared:

'* * * To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. *In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible.'"* (Cases cited.) (Italics ours.)

Conclusion.

To recapitulate: the Government failed to make out a case of embezzlement against appellant because it failed to prove beyond a reasonable doubt, or at all, at least three of the essential elements of the offense charged against appellant. These elements were:

1. Ownership in the United States of the particular coupons alleged to have been embezzled;

2. Knowledge upon the part of appellant of such ownership in the United States; and

3. Possession by appellant in his fiduciary capacity as chairman of the War Price and Rationing Board, of the particular coupons alleged to have been embezzled.

In other words, the Government failed to establish even the *corpus delicti* of the offense charged.

In addition, the substantial rights of the appellant were further prejudiced by the erroneous admission of the evidence of purported similar offenses in a case where such evidence was inadmissible under the exceptions to the general rule excluding such offenses, and where such offenses were not properly or sufficiently proved.

For the foregoing reasons, we submit that the judgment of the District Court appealed from should be reversed.

Respectfully submitted,

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APPENDIX.

Testimony of Government Witness James P. Murray as to Purported Similar Offenses.

At the time when I saw Mr. Henderson at 1979 S. Vermont Avenue, I was a whiskey salesman, and I went out to get my "C" book. I had a conversation with him.

By Mr. Norcop: Q. Tell the jury what was said and done by—

Mr. Cannon: Objected to as immaterial, having no issue in the case, too remote.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness (continuing): I told Mr. Henderson that I had an "A" book and I was applying for my "C" book in order to get enough gasoline to run both jobs that I was working at, and I asked Mr. Henderson if I could get some coupons enough to run me on until I could get my "C" book. He had a paper sack down there at the end of the desk and he reached in and gave me a few coupons and said, "I think this will run you until you can get the book through." [Tr. p. 47.]

Later when I ran out of tickets I went back and asked him if I could get some more, and I had a conversation with Mr. Henderson on the sidewalk in front of the rationing board.

Q. Give us the conversation.

Mr. Cannon: If the court please, I object on the ground that it is immaterial and has no bearing on the issues in this case, and particularly on the ground that it is too remote.

The Court: Overruled.

Mr. Cannon: Exception. If the court please, without having to interrupt each time on these various conversations, may it be understood without my making specific objections to each portion of the testimony of the witness having to do with this conversation, that I have a running objection to the entire conversation.

The Court: As far as this conversation is concerned, it is satisfactory to the court, if it is agreeable to Mr. Norcop.

Mr. Norcop: That is agreeable, Your Honor.

The Court: Very well.

Mr. Peterson: The same exception taken or noted as though verbally stated.

The Court: That is understood.

Mr. Norcop: So stipulated.

The Witness: I asked Mr. Henderson at that time if I could get any more tickets, that I was about to run out, and I wanted some more to make a trip up to Bakersfield, and he says, "I will give you a few more." He said, "If you go out there in my car, it is parked on a lot, there are some folded up in a newspaper, and they are sticking on the inside of the door handle on the left hand side there where the steering wheel is." And I went out. I said "Which car is it?" And he pointed it out, and I went out there and found this newspaper and some tickets inside the newspaper, that is, separate tickets, they wasn't all in sheets, just torn up.

Q. By Mr. Norcop: What do you mean by tickets? A. I mean coupons, gas rationing coupons, "A" coupons.

Q. Did you take them? A. Yes, sir. [Tr. pp. 48 and 49.]

The Witness (continuing): The next time I had a conversation with Mr. Henderson concerning gas coupons was on January 30, 1943, at the ration board. Just he and I present. [Tr. p. 49.]

Q. Tell us everything that was said and done. A. He asked me if I could get him some Calvert whiskey—

Mr. Cannon: Just a minute. I object on the ground it has no bearing on the issue in the case, immaterial, and too remote.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection to this conversation, and may it be deemed to be overruled and an exception taken?

The Court: It is agreeable to the court.

Mr. Norcop: So stipulated. [Tr. pp. 49-50.]

The Witness (continuing): At that particular time? He told me that that I couldn't get any more tickets without a cost to me. He said friendship would go a long way, but we just can't continue this. He said, "If you could sell some tickets I think I would be able to get you some." I said, "What do you ask for them? How much do I have to get for them? I never have tried to sell any."

Q. That is what you said to him? A. Yes, sir. And he said I can sell them for $20 a thousand. That is, I would have to pay him that for them. And all over the $20 I got out of it, it was up to me to keep.

Q. That is what he said: A. Yes, sir. [Tr. p. 50.]

The Witness (continuing): I went back to the Board a few days later than that: he left me some "C" coupons at that time. [Tr. p. 51.]

By Mr. Norcop: You were going to direct me to a conversation or a meeting that you had with Mr. Henderson subsequent to that date? A. Yes, when I got the first—

Q. The approximate time, fix it any way you want. A. Well, the ones he gave me then ran me up until February, with the coupons that I had in my book, they ran me up until around February.

Q. All right. A. Then along about the first of March I asked him for some more tickets, and then he gave me the thousand gallons of tickets.

Q. Where were you, then, on this date, this occasion on the first of March?

The Court: Can you just as well say "coupons" if you mean coupons?

The Witness: I will try to to remember that, Your Honor. That is what I mean, coupons, gas coupons.

The Witness (continuing): About the 1st of March I called Mr. Henderson and told him I thought I could sell one thousand. I called him up at his home. I recognized his voice.

Mr. Cannon: I object to the conversation on the ground that it is immaterial and has no bearing on the issues in this case; does not tend to prove any issue in this case.

The Court: It is overruled.

Mr. Cannon: Exception.

The Witness: Well, I called him and told him I thought I could sell one thousand gallons of "C" coupons that he asked me about. And he asked me where I was and I told him to meet me on the corner of Hoover

and 36th Street, and in about 20 minutes he came down alone. He walked up east on 36th Street and he had a newspaper in his hand and let the newspaper down on the telegraph post and told me to go over there and pick it up, and I went over and picked it up and there was 250 "C" coupons in this paper. And I told him that the man was waiting out there at the gas station and I would be over to the rationing board and give it to him as soon as I could contact this man. And he said, "Well, call when you get over there." And I went over there as soon as I made the delivery of the tickets. I sold them to Mr. Hubler for $40.00. I called Mr. Henderson at the rationing board and talked to him over the telephone. I recognized his voice and I said, "Come over to the lot there."

Mr. Cannon: I object to the question on the ground that it is immaterial, that it has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness (continuing): I went over to the lot and sat down in his car and he came over in a few minutes and I gave him $20.00.

By Mr. Norcop: Q. Did you have any further conversation over there in his car?

Mr. Cannon: May my same objection go that it is immaterial, has no bearing on the issues in this case?

The Court: It may be so considered. Is this offered for the purpose of intent, showing these other matters, Mr. Norcop?

Mr. Norcop: Yes. For the purpose of showing intent.

Mr. Cannon: It is understood too that it has been offered and received over my objection, and an adverse ruling by the court and an exception to that ruling.

The Court: That is true.

By Mr. Norcop: Q. Mr. Murray, had you finished relating the conversation? A. No, sir, I hadn't.

Mr. Norcop: Have you got your objection in that you wanted, Mr. Cannon?

Mr. Cannon: Yes.

The Witness (continuing): The defendant said that in the future whenever we contacted each other, it should not be done around the Board. He said, "When you call, if you want 'A' tickets, call for Ancient Age Whiskey, and 'B' tickets would be Brown Foreman, and 'C' tickets would be Calverts." And if I was to want one thousand coupons I would ask for 1 case of whiskey. I saw him practically every week. [Tr. pp. 51 to 54.]

The Witness (continuing): I had a telephone conversation with the defendant before I met him at Jefferson and Crenshaw.

Q. What was the subject of the telephone conversation?

Mr. Cannon: Objected to on the ground that it is immaterial and has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness (continuing): I told him I needed a case of Calverts and he said O.K. So we met at Jefferson and Crenshaw after the 'phone call.

Mr. Peterson: As to that conversation, the same objection heretofore made.

The Court: The same ruling.

Mr. Peterson: Save an exception.

A. I asked him to get me a "C" book. There was no money passed at that time. The book that you show me looks like the one that was in the can. (This was marked for identification.) I again saw him just a couple of days before I was arrested, and he gave me a little white box with three thousand "T" coupons and two thousand gallons of "C" coupons.

By Mr. Norcop: Tell the jury all that you said and all that he said and all that was done there.

Mr. Cannon: Objected to on the ground that it has no bearing on the issues of the case, and it is incompetent.

The Court: Overruled.

Mr. Cannon: Exception.

A. He told me he was going on a fishing trip and would leave me some coupons for sale, in the event I needed them. [Tr. pp. 55-56.]

By Mr. Norcop: Q. I now show you a little pasteboard box and ask you if that is the box you had referred to in your testimony before the lunch hour. A. It is the one that Mr. Henderson gave me just before going to Arrowhead.

Mr. Norcop: We offer this package in evidence with its contents.

Mr. Peterson: It is objected to on the ground that it is no part of the transaction for which the defendant is on trial. It is too remote and has no bearing on the issues set forth in the indictment.

The Court: Overruled.

Mr. Peterson: An exception.

(Whereupon package and contents referred to were received in evidence as Government's Exhibit 11.)